FILED
APR 24 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 898

SMITH-JOHNSON STEAMSHIP CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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APRIL 24, 1956.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Smith-Johnson Steamship Corp. prays that a writ of certiorari issue to review the order of the Court of Claims in its favor entered in the above-entitled case on March 6, 1956.

Opinion Below

The opinion of the Court of Claims is not yet reported. It is printed in Appendix B hereto, pages 14-20, *infra.*

Jurisdiction

The date of the order of the Court of Claims sought to be reviewed is March 6, 1956. R. 121-126; Appendix B, pages 14-20, *infra.*

The jurisdiction of this Court is invoked under 28 U. S. C. § 1255(1).

Petitioner, the successful party in the court below, seeks review of the judgment in its favor because of

the pending petition for certiorari (filed April 14, 1956) in *Sword Line, Inc.* v. *United States of America*, No. 861. In *Sword Line*, review is sought because the decision of the Court of Appeals for the Second Circuit in that case is in conflict with the decision of the Court of Claims in this case.[1] The opinions below in *Sword Line* are printed herein as Appendix C, pages 21-38, *infra*.

Section 1255(1) of 28 U.S.C. authorizing review of cases in the Court of Claims "By writ of certiorari granted on petition of the United States or the claimant" gives this Court jurisdiction to grant certiorari on petition of the successful claimant. Under somewhat similar circumstances certiorari was granted on petition of the successful party in *United States* v. *Bankers Trust Co.* (reported *sub nom. Norman* v. *Baltimore & Ohio R. Co.*), 294 U.S. 240, 294-295.

The judgment and order below is non-final, the court having found only that it has jurisdiction of the case under the Tucker Act, 28 U.S.C. § 1491(2). The provisions of 28 U.S.C. providing for a review by writ of certiorari of "Cases in the Court of Claims"— without limiting it to cases in which there is a final judgment—invest this Court with jurisdiction. *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 341 U.S. 48, 49; *United States* v. *Esnault-Pelterie*, 299 U.S. 201, 202-3, and note 4; cf. *Ickes* v. *Associated Industries*, 319 U.S. 739.

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[1] On April 18, 1956, the Solicitor General filed a memorandum in No. 861 stating in part:

> ". . . we do not oppose the granting of the writ, because of the decision of the Court of Claims in *Smith Johnson S. S. Corp.* v. *United States*, No. 98-55, decided March 6, 1956, a decision which that court stated to be in conflict with the decision below in respect of Suits in Admiralty Act jurisdiction (Pet. 41-47)."

Question Presented

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels to citizens of the United States at a rate of hire to consist of a basic charter hire, plus "additional charter hire," the latter to be at the rate of one-half of the charterer's cumulative net profits in excess of 10% per annum on capital necessarily employed. Instead of providing for "additional charter hire" at the rate of one-half of such excess profits, the Maritime Commission required petitioner herein to agree to pay "additional charter hire" at a sliding scale rate reaching as high as 90 per cent of the cumulative excess net profit, and to make preliminary payments on account thereof. The charterer did make such preliminary payments, and this suit was brought in the Court of Claims to recover the difference between the amounts of such preliminary payments and the amount of additional charter hire which lawfully accrued in accordance with the Merchant Ship Sales Act of 1946.

The question presented is:

Does the Court of Claims under 28 U.S.C. § 1491 or does the District Court under the Suits in Admiralty Act or the Public Vessels Act have jurisdiction over petitioner's claim for the return of the difference between the preliminary payments of additional charter hire it was required to make by the charter agreement and the smaller amount of additional charter hire that lawfully accrued to the Government in accordance with the Merchant Ship Sales Act of 1946.

Statutes Involved

The statutory provisions involved are 28 U.S.C. §1491 (originally the Tucker Act); Sections 1 and 2

of the Act of March 9, 1920 (known as the Suits in Admiralty Act), 41 Stat. 525, 46 U.S.C. §§741, 742; Sections 1 and 2 of the Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. §§781, 782 (known as the Public Vessels Act); Section 5 of the Merchant Ship Sales Act of 1946, 60 Stat. 43, 61 Stat. 191, 50 U.S.C. App. §1738; and Section 709(a) of the Merchant Marine Act, 1936, 49 Stat. 2010, 46 U.S.C. §1199(a). They are printed in Appendix A, *infra*, pp. 9-13.

Statement

Petitioner herein sued on March 9, 1955, in the Court of Claims under 28 U.S.C. §1491 for the return of the difference between preliminary payments of "additional charter hire" it was required to deposit with the Government and the "additional charter hire" that lawfully accrued to the Government for the use of war-built vessels in accordance with the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C. App. §1735 *et seq.*

The Ship Sales Act provided for the charter of war-built vessels to citizens of the United States upon terms and conditions therein prescribed. In addition to providing for basic charter hire, the Ship Sales Act, in Section 5(c) (by incorporating Section 709(a) of the Merchant Marine Act, 1936, 49 Stat. 2010, 46 U.S.C. §1199(a)), required that:

> "Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead

expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum . . ."

Petitioner duly applied for the charter of war-built vessels pursuant to the terms of the Ship Sales Act. Purportedly acting in accordance therewith, officials of the Maritime Commission, as a condition precedent to the allocation of vessels to petitioner, required petitioner to sign a charter agreement (Contract No. MCc-42460, SHIPSALESDEMISE Form No. 303). Petitioner executed the charter agreement thus tendered, and eight vessels were delivered pursuant thereto.

This charter agreement (in the form published at 46 C.F.R. §299.82), instead of providing for the payment of additional charter hire at the rate of one-half the cumulative net profit in excess of 10 percent per annum on capital necessarily employed as prescribed by the Ship Sales Act, provided for the payment of additional charter hire at a rate based on a sliding scale reaching as high as 90 percent.

The charter agreement, and certain incidental regulations issued by the respondent, required petitioner to make, and petitioner accordingly made, preliminary payments on account of additional charter hire to the respondent totaling the sum of $613,395.32. Subsequently, by final audit, respondent asserted a total accrual of $616,063.04 as additional charter hire under the charter agreement.

Petitioner claimed that the requirement in the charter agreement that it pay more "additional charter

hire" than prescribed by the Statute was illegal and void, and it sued for $231,773.81, the difference between the sum of the deposits it was required to make pursuant to the terms of the charter agreement and the additional charter hire which accrued in accordance with the formula prescribed by Congress.

Respondent in its answer to petitioner's petition in the Court of Claims interposed a special defense of want of jurisdiction, alleging:

> "Defendant alleges that plaintiff's cause of action is on a maritime claim for the recovery of an alleged overpayment of charter hire for the use as merchant vessels of certain vessels owned by defendant and as such is within the exclusive jurisdiction of the admiralty courts pursuant to the Admiralty Claims Acts, 46 U.S.C. 741-749, 781-789, and this court has no jurisdiction of the subject matter of plaintiff's petition."

Petitioner moved in the Court of Claims to strike this defense as insufficient in law, and the motion was granted on March 6, 1956. Review is sought of the order granting petitioner's motion.

Reasons For Granting the Writ

This case should be reviewed by this Court both because, as the decision of the court below states, it is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, 230 F. 2d 75, printed herein as Appendix C, pages 21-38, *infra*, and because this conflict involves important issues as to the jurisdiction of the Court of Claims and of the District Courts, respectively, of suits for the recovery of illegal exactions made by government officials under supposed authority

of an Act of Congress, when such sums were exacted as charter hire of government-owned merchant vessels. Cf. *U. S. Alkali Export Association* v. *United States*, 325 U. S. 196.

While both this case and the *Sword Line* case present the same jurisdictional issue, the *Sword Line* case also presents at least two other issues, peculiar to that case,[2] upon which its outcome might turn. The case at bar presents, on a simple and unencumbered record, the basic question in the large number of cases now pending not only in the Court of Claims but in the district courts of the First, Second, Third, Fifth and Ninth Circuits.[3]

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[2] These other issues are whether an arrangement in bankruptcy released the claim and whether the admiralty suit was filed too late. No other case involves an arrangement in bankruptcy, and while timeliness of suit is at issue in other cases (brought in the admiralty court), the factual situation in *Sword Line* with respect to this issue is unique.

In *Sword Line* alone, we believe, the Maritime Commission, acting under a reserved power, ended the charter agreement. Thereafter the vessels were returned and the court held that the cause of action arose upon their return because all the facts were then in existence upon which suit could be based. (228 F. 2d at 347.) That *Sword Line* turned on its peculiar facts is shown by the recent per curiam affirmance by the Court of Appeals for the Second Circuit (April 19, 1956, not yet reported) of District Judge Walsh's decision in *American Eastern Corporation* v. *United States*, 133 F. Supp. 11.

In that case, where the charter agreement had *not* been cancelled, Judge Walsh held that a similar claim did not arise until long after the return of the chartered vessels. He said:

> "To the extent libelant claims for money had and received, its claim was mature when respondent, through the Maritime Commission's regulations for final accounting, unequivocally asserted its intent to withhold the money now claimed by libelant." (133 F. Supp. at 15)

[3] See Memorandum for the United States in No. 861, page 2.

Conclusion

The writ should be granted.

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